No. 15798

United States Court of Appeals

For the Ninth Circuit

CLYDE PHILP, *Appellant,*

vs.

SAM MACRI, PAULINE MACRI, JOSEPH MACRI, ELEANOR MACRI, DON R. MACRI, KATHLEEN N. MACRI, HERMAN HOWE and VIOLA B. HOWE, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based on diversity of citizenship in a controversy involving more than $3,000.00. The complaint alleges that the plaintiff is a resident of Lima, Peru (Tr. 3); that the individual defendants, the Macris and the Howes, live within the jurisdiction of the District Court (Tr. 4), and that the defendant Continental Casualty Company is an Indiana corporation doing business within the jurisdiction of the District Court (Tr. 4). The matter in controversy in the first cause of action exceeds $87,000.00 (Tr. 14, 15). The matter in controversy in the third cause of action is $100,000.00 (Tr. 20). Thus jurisdiction in the District Court exists under 28 U.S.C. 1332.

Jurisdiction of this Honorable Court rests on 28 U.S.C. 1291 and 28 U.S.C. 1294.

STATEMENT OF THE CASE

Since this appeal is based upon the dismissal of appellant's complaint for insufficiency, the facts of the case must be limited to those set forth in the pleadings.

I. First Cause of Action

The first cause of action asks for injunctive relief to prevent the fraudulent enforcement of a judgment by the appellees in Lima, Peru, where the appellant is engaged in the contracting business. The complaint alleges that the appellant had, in 1944, engaged in a joint venture with various of the appellees, which consisted of the performance of a sub-contract to do work appurtenant to the construction of the Roza Dam in the State of Washington (Tr. 5). Continental Casualty Company was the surety on the performance bond furnished by the joint venturers (Tr. 6). The principal sum of the bond was $84,833.75. The joint venture was terminated later in the year, a written memorandum setting forth the terms of the termination having been executed between the joint venturers (Tr. 23). By the terms of this agreement, the appellant was obligated to pay the appellees 52⅓% of the loss, if any, on the construction contract and the appellees agreed to perform the work thereunder as expeditiously as possible and as required by the contract obligations. The termination agreement further provided that the arrangement therein made should be accomplished in a spirit of co-operation and friendship (Tr. 26, 27).

The appellees did not carry out the construction work in an expeditious manner, but unreasonably and without cause, carelessly delayed in finishing the work,

causing excessive cost and expense (Tr. 7). This was in violation of the termination agreement. Thereupon, suit was instituted in the name of the United States of America for the use of certain sub-contractors against the appellant, the appellees and the surety, Continental Casualty Company. The appellees in the same action cross-complained over against the appellant for losses which they had purportedly suffered on the job (Tr. 8). The appellant in response to the cross-complaint asked for an accounting (Tr. 7, 8). Judgment was entered against the appellant and the appellees in favor of the bonding company, Continental Casualty Company, in the sum of $87,828.81, plus interest and attorneys' fees; the action of the use plaintiffs against the appellant was dismissed, and the cross-complaint of the appellees against the appellant was dismissed for the reason that the appellees failed and refused to give the required accounting (Tr. 4, 7, 8).

After receiving its judgment, Continental Casualty Company, by means of attachment, garnishment and execution recovered some $17,000.00 which was due the joint venturers (Tr. 9). Thereafter, the appellees made a settlement with Continental Casualty Company. However, instead of requring any satisfaction of the judgments, the judgment of the bonding company was assigned to the appellee Herman Howe. Howe actually has not had and does not have a real interest in the judgment but merely holds the same as agent for the appellees Macri for their use and benefit (Tr. 9).

While the appellant is referred to in this summary as having engaged as an individual in a joint venture

with the appellees Macri, in fact, appellant and one Goerig doing business as a partnership were engaged in the joint venture with the appellees Macri. The judgment of Continental Casualty Company was against Goerig and appellant. The appellee Howe actually had sued Goerig on this judgment in Idaho but that suit was settled by Goerig paying Howe $2,250.00 in return for which Howe dismissed the suit and delivered to Goerig a full release executed by the appellees Macri (Tr. 12, 13).

The appellee Howe thereafter, for the use and benefit of the appellees Macri, brought an action in the country of Peru in order to enforce the collection of the Continental Casualty Company judgment against the appellant (Tr. 10). In the United States, the appellant would have various defenses to the enforcement of the judgment by appellees. Such defenses, centering on the requirement that one partner to sue another partner, must first render an accounting, are not available to him in Peru (Tr. 10, 11). The appellees thus are conspiring to defraud the appellant by making him pay 100% of the loss of the joint venture despite an agreement to the contrary (Tr. 14). Whatever the bonding company may have paid out on the judgments against it, the appellees Macri in fact sustained no loss and actually realized a profit on the job and they have failed and refused to provide an accounting to the appellant (Tr. 13). Not only are the appellees attempting to collect the full amount of the judgment which arises out of transactions wherein they were joint venturers and co-partners with the appellant, but they are at the

same time attempting to retain profits out of the same joint venture, all of which would produce a most inequitable result (Tr. 15). Based upon the foregoing facts, the appellant prays that he have an order restraining the appellees from bringing or prosecuting against him any action arising out of the assignment of the judgment on behalf of Continental Casualty Company to the appellee Howe pending an accounting in which further liability, if any, can be determined by a court of proper jurisdiction. In this respect the appellant submits himself to the equitable jurisdiction of the court for all purposes, including a declaration, if warranted, of liability in such amount as the court might find.

II. Second Cause of Action

Appellant makes no specification of error with respect to dismissal of his second cause of action.

III. Third Cause of Action

This is in substance a cause of action for slander. The appellant alleges the facts set forth in his first cause of action and in addition thereto the following: Appellees circulated in financial circles in Lima, Peru, the false story that they were going to sue the appellant because he did not pay his share of a joint venture, although they knew that appellant was being asked to pay more than 100% of the alleged losses and that his liability could not exceed 52⅓% of any such loss (Tr. 18, 19). They contacted various citizens of Peru and advised them that the appellant was heavily indebted to them, thereby giving an incomplete, damaging and derogatory view of the appellant's financial

condition (Tr. 18). As a result of this slanderous conduct, the appellant was damaged in the sum of $100,000.00.

IV. Action Of Trial Court

The appellees moved against the respective causes of action set forth in the complaint for the reason that they each failed to state a claim upon which relief could be granted and for the further reason that the complaint had failed to set out a short and plain statement of the claim as required by Rule 8 (a) (2) of the Federal Rules of Civil Procedure (Tr. 29, 30, 32).

The District Court dismissed the three causes of action, finding that the complaint was to some extent violative of Rule 8 (a) (2) of the Federal Rules of Civil Procedure and subject to dismissal under Rule 12 (b) (6) of the Rules for the reason that the respective causes of action and all of them failed to state a claim upon which relief could be granted. As stated before, no error is specified as to the dismissal of the second cause of action, and therefore there is no discussion of the Court's ruling thereon. With respect to the first cause of action, the reason for the Court's dismissal thereof seems to have been that the appellant had subjected himself to the jurisdiction of Peru and that having unsuccessfully contested the lawsuit there, his application for a restrainer of the appellees would not be heard (Tr. 33). With respect to the third cause of action, the District Court seems to have considered this cause of action as one for malicious prosecution, as it did the second cause of action, and dismissed the third cause of action without any discussion or recognition that it involved slander (Tr. 34).

V. Issues

It is the position of the appellant that the following issues are raised by the facts as set forth in the foregoing pleadings:

1. Is this Court open to the plea of a resident in a foreign jurisdiction for equitable relief?

2. May the Court restrain a person subject to its own jurisdiction from prosecuting an action in another jurisdiction, given the proper grounds for doing so in its own jurisdiction?

3. Does the attempt by a partner or a joint venturer to enforce the payment of a judgment by another partner or joint venturer for 100% of the loss of the joint venture, without first rendering an accounting, provide a proper basis for injunctive relief?

4. Were sufficient facts pleaded in the third cause of action to provide the basis for a slander action?

SPECIFICATIONS OF ERROR

The District Court erred in the following particulars:

1. In considering the complaint as being violative, presumably for prolixity, of Rule 8 (a) (2) of the Rules of Civil Procedure.

2. In basing dismissal of the first cause of action on matter outside the pleadings, that is, the statement in appellees' Memorandum of Authorities as to the status of the proceedings in Peru.

3. In basing dismissal of the first cause of action upon the ground that the appellant was subject to the jurisdiction of the courts of Peru.

4. In failing to hold that the first cause of action stated sufficient facts upon which injunctive and equitable relief could be granted.

5. In failing to consider the nature of the third cause of action and in holding that there were insufficient facts pleaded therein to constitute a cause of action for slander.

ARGUMENT

I. The Complaint Is Not Offensively Prolix

The subject matter of this action involves ramifications which are widely spread as to time, parties and substance. Certainly, with hindsight, one can point to the complaint and suggest additions, alterations and deletions. But the test, as with most human effort, is sufficiency and not perfection. This is the spirit and ruling of the cases which have considered motions of this character. This Court in *United States v. Hyde, et al.* (1906) 145 Fed. 393, 394, stated:

> "Absolute perfection in pleadings is not often obtained and there may be some averments in the bill that might perhaps have been more clearly stated, and some sentences might with propriety have been left out, but this character of criticism could be urged in all cases. Courts should deal with the substance, not the mere form of language used in a pleading." ....

The tenor of this ruling was applied recently in *Sunbeam Corp. v. Payless Drug Stores* (N.D. Cal., 1953) 113 F. Supp. 31, which consisted of a complaint of thirty-four legal size pages, plus thirty-five pages of exhibits. The Court refused to strike.

See also Moore's Federal Practice, Second Edition,

Volume 2, page 2312, *et seq,* Section 12.21, especially at page 2317, and also Section 8.13 at page 1652, where there is cited with approval the view of Judge St.Sure in *Securities Exchange Commission v. Timetrust Inc.* (N. D. Cal. 1939) 28 F. Supp. 34, 1 Fed. Rules Ser. 8 a .25 Case 4:

> "Perfection in pleading is rare. There may be allegations in the complaint which might properly have been left out, but this kind of criticism could be urged in all cases. Prolixity is a besetting sin of most pleaders. Courts should deal with the substance and not the form of the language of the pleadings. Where no harm will result from immaterial matter not affecting the substance, courts should hesitate to disturb a pleading. Another consideration, in such circumstances, is that to grant the motion would delay bringing the case to a speedy trial."

II. The Facts Stated in the Complaint and Their Reasonable Intendments Must Be Taken as True

The determinative facts in this case are those set forth in the complaint, together with the reasonable inferences to be draw therefrom. In *Radovich v. National Football League* (1957) 352 U.S. 445, 77 S. Ct. 390, 1 L. Ed. (2d) 456, Reh. den. (1957) 353 U.S. 931, 77 S. Ct. 716, 1 L. Ed. (2d) 724, the Court stated at page 448:

> "Since the complaint was dismissed, its allegations must be taken by us as true."

At page 453, the Court stated:

> "Likewise we find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in *Hart v. B. F.*

Keith Vaudeville Exchange, 262 U.S. 271, 274, 43 S. Ct. 540, 541, 67 L. Ed. 977 (1923) is whether 'the claim is wholly frivolous.' ''

In the case of *Lada v. Wilkie* (CCA 8, December 18, 1957) 25 Fed. Rules Serv. 12 b .34 Case 1; 250 F.(2d) 211, the District Court had dismissed the complaint on the grounds that it had failed to state a claim upon which relief could be granted. The court in its opinion summarized the allegations of the complaint which set forth that the plaintiffs were residents and citizens of Germany and heirs at law of the deceased; that the defendants in effect fraudulently induced the plaintiffs to acept $20,000.00 for their interest in the estate which consisted of oil lands. The relief prayed for was that the conveyances made by the plaintiffs to the defendants be set aside, that the probate proceeding be vacated, that they receive the rents under the oil lease paid to the defendants and for certain other relief. The Court stated as follows:

''The plaintiff's complaint is not a clear, concise and definite statement of their claim. As the District Court ruled, part of the relief which they demanded the Court could not possibly grant. The question, however, was not whether all of the relief asked for by the plaintiffs could be granted, but whether, under any state of facts which might be established at a trial in support of the claim stated in the complaint, they could be accorded any relief.

''Assuming, as we must, for the purposes of this case, that the facts stated in the complaint are true, we think that the District Court would not be powerless to do anything toward righting such

wrongs as those of which the plaintiffs complain. If, as might be inferred from the facts alleged in plaintiff's complaint, viewed in the light most favorable to them, the defendants . . . bore to them a relation of trust and confidence, acquired in the way of gains, profits or property out of the estate . . . exceeding in amount or value the $20,000.00 which had been paid to the plaintiffs for the estate, would have to be accounted for by those defendants and would in equity belong to the plaintiffs under the principles upon which this court relied in (citing cases) and which are applicable generally to those who take advantage of a fiduciary relationship to acquire the property of others to whom they owe a duty of fidelity.

"The plaintiffs' claim, may at a trial on the merits, prove to be groundless, but as was said by Mr. Justice Brandeis in *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 51-52 'lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.' The order appealed from is reversed and the case is remanded with directions to reinstate the plaintiffs' complaint and to try the case on the merits."

III. On a Motion to Dismiss, Matter Outside the Pleadings Should Not Be Considered

With respect to the foreign action, appellant's complaint sets forth no more than that the appellees brought an action against him in the Supreme Court of Peru (Tr. 10). There is no allegation as to the course of the action or as to the status of the pleadings in Peru. The District Court, however, states that the appellant actively appeared and unsuccessfully contested

the Peruvian lawsuit (Tr. 33). It seems clear that the District Court considered that such action on appellant's part estopped him from seeking relief. The District Court's ruling would make it appear that the appellant had voluntarily submitted himself to the jurisdiction of the Peruvian court and applied for relief to this Court only when it developed that his choice as to forum and procedure was poor. As stated before, there is no allegation whatsoever in the complaint on which such a finding can be based and indeed, the facts alleged in the complaint actually state, to the contrary, that the appellant was involuntarily drawn into the Peruvian court. The only area in this entire proceeding which provides a basis for the District Court's statement is the following language in the appellees' Memorandum of Authorities submitted to the District Court which, on page 2, line 20 thereof, states:

> "Plaintiff herein seeks equitable relief, without offering to do equity. His sole purpose is to prevent the defendants from carrying on the suit which they had instituted in the only country where the plaintiff could be found. The suit so instituted has been pending for many months and is now in the appellate courts of Peru and defendants respectfully submit that the jurisdiction of the Peruvian courts should not be interferred with by the courts of this country."

It is true that Rule 12 (b) of the Federal Rules of Civil Procedure provides:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and

not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

It is evident that none of the requirements of Rule 56 were complied with or even considered in this matter. No notice was given as required by the Rule nor were there any depositions, admissions, affidavits or any matter other than the Memoranda of Authorities presented to the Court for its consideration. A case aptly in point is that of *Sardo v. McGrath* (CCA, D. C. 1952) 196 F.(2d)20. This was a suit by an alien against the Attorney General for a declaratory judgment relative to a prior deportation hearing. The defendant moved to dismiss and an order was entered dismissing the complaint with prejudice. The government argued that while the District Court inadvertantly phrased its order in terms of dismissal of the complaint, what was really intended was the entry of a summary judgment. In support of this proposition, it was argued that the trial court, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, could treat a motion to dismiss for failure to state a claim as a motion for summary judgment, if matters outside the pleadings were properly presented. The statements outside the record were the statements of fact contained in their memorandum of points and authorities filed in the District Court. The Court stated as follows:

"Whether or not a summary of this kind, drawn up by an attorney and included in his memoran-

dum of points and authorities, can qualify as 'matters presented' within 12 (b) depends on our view upon whether it is the sort of material contemplated by Rule 56. The latter is the definitive rule concerning summary judgment; Rule 12 (b) merely provides one means of arriving at that end. It does not enlarge the record on which a summary judgment may be granted under Rule 56. (The court then sets forth the pertinent language of Rule 56 (c)). Thus, the extra-pleading matters presented must be either 'depositions,' 'admissions' or 'affidavits.' All three possess certain characteristics which make them fitting instruments for cutting through a possible maze of false, illusory or collateral issues raised by loosely drawn pleadings. As the sworn statement of those who have first hand knowledge of that about which they speak, they partake not only of the ceremonial quality of testimony in open court, but also of some of the guarantees of trustworthiness which characterize such testimony.

"In marked contrast, memoranda of points and authorities are no more than trial briefs which must be filed with each motion presented to the District Court. They must state 'the specific points of law and authorities to support the motion' and are expressly not made part of the record . . . Neither the Federal Rules nor custom at the bar contemplate transformation of legal memoranda into a new vehicle of actual conflict. Certainly, attorneys do not ordinarily conceive that they proceed at their peril if they fail to controvert allegations of fact made by opposing attorneys in their briefs. To accept appellee's view would be to introduce a confusing system of collateral pleading which could only detract from the relative simplicity of present summary judgment practice."

IV. The District Court Has the Capacity to Restrain a Person Subject to Its Jurisdiction from Acting in a Foreign Jurisdiction

In a proper instance, courts can enjoin a person subject to its own jurisdiction from doing an act in a foreign jurisdiction. See Conflict of Laws by Joseph H. Beale (1935) Volume 1, page 415, Section 96.1, wherein it is stated:

> "If, however, the court is only asked to forbid the defendant who is within the state from doing an act abroad, there can be no objection to a decree; since the defendant, being within the state, may remain there and abide by the terms of the decree. He is not compelled to act elsewhere in violation of the rights of any other state. The defendant, in other words, may legally be enjoined from acting anywhere. The principle is illustrated by the important case of *Philadelphia Company v. Stimson* [223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912)]. The Secretary of War had made regulations concerning the use of riparian land which interferred with the use plaintiff desired to make of his own riparian land. Plaintiff, claiming that the regulations were invalid, filed a bill in the District of Columbia to restrain the Secretary from enforcing the regulations. The land was outside the District. The Court held nevertheless that it had the right to issue the injunction. This is the ground upon which it is held that a court may restrain a party within its territory from bringing suit abroad, though the power is used only in a very strong case."

In the cited case of *Philadelphia Company v. Stimson,* suit was brought in the courts of the District of Columby a Pennsylvania corporation. The subject matter of

the suit was the reclamation and occupation of certain lands by the Philadelphia Company in the harbor area of Pittsburgh, Pennsylvania. The defendant demurred, including among his grounds the plea that the Supreme Court of the District of Columbia had no jurisdiction to define boundaries in Pennsylvania or to remove a cloud upon title in that state. The Supreme Court of the United States stated that having jurisdiction of the person of the defendant and therefore being able to compel obedience to its decree, there was no reason why the Courts of the District of Columbia could not consider the equities involved and, on this jurisdictional basis, it proceeded to give the Pennsylvania corporation relief against the Secretary of War who resided in the District of Columbia by enjoining him from acting in the State of Pennsylvania.

See also Handbook on the Conflict of Laws, Third Edition, Herbert F. Goodrich (1949), Section 68, which states as follows:

> 'There is abundant precendent for enjoining a defendant, personally before the court, from doing acts abroad. He may be ordered not to trespass on foreign land, not to commit torts of any other nature *and may be enjoined from prosecuting foreign lawsuits.*" (Emphasis supplied).

The American Law Institute Restatement, Conflict of Laws, Section 96, states as follows:

> "In the exercise of their discretion courts frequently forbid individuals subject to their jurisdiction to perform acts in another state. Since such a decree can be carried out without disturbing the physical status quo in another state and since the

> defendant may ordinarily obey the injunction by remaining in the state which issued the decree, such orders are not uncommon. Whether a decree of this character will be rendered depends upon the principles of equity jurisdiction as understood and developed by the courts of the forum and is no part of the Restatement of this Subject. It may be stated, however, that when acts are threatened which subject the plaintiff to irreparable damage or when the balance of convenience and fairness require, such a decree will be readily issued."

The facts in the instant case should appeal strongly to the equity and conscience of the Court. There is also the matter of convenience and assistance to the Court and the parties in the development of the facts. The entire factual background of this matter is within this jurisdiction and not thousands of miles away. To establish appellant's defenses in Peru, considering the great barriers of distance and language, would be a most formidable task, assuming that it were in any degree possible to do so, although appellant has pleaded as a fact that the possiblity does not exist. This element of convenience was considered in *Northern Pacific Railway Company v. Richey & Gilbert Company* (1925) 132 Wash. 526, 232 Pac. 355, which held that an injunction was properly granted whereby the prosecution of a suit in Minnesota by a Washington corporation on a cause of action arising in Washington against a Wisconsin railroad corporation, whose principal place of business was in Minnesota, was properly granted. See also *Donaldson v. Greenwood,* 40 Wn.(2d) 238, 242 P. (2d) 1038 (1952) and *Steele v. Bulova Watch Company,* 334 U.S. 280, 73 S. Ct. 252, 97 L. Ed. 319 (1952).

V. The Appellees Are Attempting to Do in a Foreign Court That Which the Law Would Not Allow Either in the Courts of the State of Washington or in Any United States District Court

Under neither the common law nor the law of the State of Washington could appellees Macri recover upon the judgment which they seek to enforce against appellant in Peru. This judgment resulted directly from transactions of the partnership composed of appellees and appellant (Tr. 5, 6, 7, 8, 9). It is settled beyond question that no action at law can be brought on such transactions until there has been an accounting of the partnership. The Supreme Court of Washington, in its most recent decision on the subject, *Stipcich v. Marinovich,* 13 Wn.(2d) 155, 124 P.(2d) 215, stated at page 163:

> "Respondent was a partner of appellant and as such was unable to maintain the present action for the reason that, until an accounting and settlement of the partnership affairs is had, there is no cause of action between partners arising out of the partnership transactions except an equitable action for an accounting. *Kwapil v. Bell Tower Co.,* 55 Wash. 583, 104 Pac. 824; *Potter v. Scheffsky,* 139 Wash. 238, 246 Pac. 576; *Pollock v. Ralston,* 5 Wn.(2d) 36, 104 P.(2d) 934."

In the *Pollock* case, last cited in the above quotation, the partnership association, as in the instant case, had terminated prior to the commencement of the action, but no accounting had yet been made. The Washington Supreme Court, in holding that the plaintiff was not entitled to a jury trial of the issues there involved,

quoted the rule from *Stevens v. Baker,* 1 Wash. Terr. 315:

> " 'The rule is almost universal that one partner cannot sue his co-partner at law, without alleging and proving a settlement of the partnership indebtedness, the accounting together of the partners and the ascertaining of a balance and a promise, either express or implied, to pay that balance.' "

The court then quoted from 47 C. J. 805, Sec. 252:

> " 'As a partnership continues after its dissolution for the purpose of collecting its claims, paying its debts, and adjusting its affairs, an action at law cannot be brought by one partner against another for money alleged to be due him on account of partnership transactions, until after a settlement, even though the partnership has been dissolved.' "

A great many cases have been gathered in the series of comprehensive annotations appearing in 21 A.L.R. 21, 58 A.L.R. 621 and 168 A.L.R. 1088, cited to the general rule, as set out on page 1091 of the latter annotation:

> "It is the universally accepted rule that, in the absence of statutory permission, or express promise, or fraud, an action ex contractu at law, as distinguished from an action in equity, is not maintainable between partners with respect to partnership transactions, unless there has been accounting or settlement of the partnership affairs."

Appellees' action, through their assignee, to compel appellant to pay the full amount of the judgment, with interest and costs, as alleged in the complaint (Tr. 14), when appellees had settled with the partner-

ship creditor for a much smaller sum (Tr. 12), is clearly prejudicial, oppressive, inequitable and fraudulent. The payments made by appellees Macri on the judgment were simply items to be included in the partnership accounting. Whether by taking them into account appellant owes anything to appellees Macri, or whether, as appellant alleges (Tr. 13) there were sufficient profits from the partnership to offset the payments, must be determined before any recovery can be had from appellant. Yet these matters cannot and will not be gone into in the Peruvian action (Tr. 10) and appellant will be deprived of his right as a partner to the protection afforded under the laws of the jurisdiction where the relationship existed and where the obligations and rights of the parties arose.

Such conduct on the part of appellees is clearly in violation of the statutory and common law mandate that they must account as a fiduciary to appellant as their partner. The uniform partnership act states the rule thus:

> "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." Rev. Code of Wash. 25.04.210 (1).

As applied to joint ventures, the Washington court, in the case of *Donaldson v. Greenwood,* 40 Wn.(2d) 238, 242 P.(2d) 1038, has quoted the following with approval from the case of *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1:

> "Joint adventureres, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."

Instead of displaying such loyalty, these appellees seek in their action in Peru to enforce the payment of the judgment to their own profit and benefit far beyond anything they could possibly be entitled to in an accounting. At most, in any accounting of the partnership, appellees could take credit for only the amount they paid upon the judgment, yet they have pursued it at its face value (Tr. 14), with neither credit nor offer of credit for the benefit obtained in their settlement with the partnership creditor.

VI. The Facts Pleaded Sufficiently State a Cause of Action for Slander

Despite the use of the term itself, the District Court ignored the action for slander. The third cause of action incorporates and realleges all of the matter set forth in the two causes of action pleaded prior thereto. The substance of these facts is that the appellees caused to be circulated in financial circles in Lima, Peru, where the appellant was engaged in the construction business, a false story relating to his solvency and financial integrity; they circulated reports that he did not pay his

share of a joint venture arrangement knowing this to be false and they contacted various residents of Peru advising such residents that the appellant was heavily indebted to appellees and giving an incomplete and derogatory view of the appellant in his capacity as a businessman; that the appellant's business reputation was thereby damaged to the extent of $100,000.00. These statements, which must be taken as statements of fact, certainly are reasonably calculated to show that the appellant was seriously exposed to damage and loss in his business or profession. Such remarks are slanderous *per se*. Prosser on Torts, Second Edition (1955), at page 590, cites the case of *Harman v. Delany* (1731) 2 Strange 898, 93 Eng. Rep. 925, which stated:

> "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person."

The reasonable intendment of the language set forth in the complaint is that the appellees commented falsely on the appellant's business reputation in a manner reasonably calculated to instill doubt, hesitation and reluctance on the part of any prospective creditor in Lima, Peru. All businessmen depend upon credit, and if possible, this is even more the case where a contractor is involved. He must have credit in extraordinarily large sums as evidenced by the entire pleadings in this action. Since this matter was before the District Court on a motion to dismiss, it was not a question of the language expressly setting forth defamatory statements, but rather that the matter set forth in the pleading be

reasonably susceptible of defamatory meaning. See *Meyerson v. Hurlbut* (1938) 68 App. D. C. 360, 98 F.(2d) 232, 118 A.L.R. 313.

CONCLUSION

The pleadings essentially set forth facts which were intended to appeal to the conscience and equitable jurisdiction of the court. The facts in essence are that the appellees, desiring to evade the requirement and responsibility of making an accounting to the appellant, struck upon the device of obtaining for their use and benefit the very foundation of the partnership liability, that is, the judgment held by Continental Casualty Company. Hiding behind a false front, the appellees have forwarded the judgment to a jurisdiction where the true state of affairs cannot be shown. They are attempting to collect all that the bonding company lost and even more since the bonding company received some amount of payment on its judgment. The fact that the bonding company made any payments as a result of which the judgment was granted, by no means compels a conclusion that the appellees did not profit on the job. The judgment on behalf of the bonding company means no more than that the latter was required to pay bills that were not paid by the appellees. This has no necessary relationship with the amount of money the appellees may have received on the job nor with the actual profits made by the appellees. Therefore, appellees are in Souh America with a judgment regular on its face attempting to collect the same in full despite their specific promise under their agreement and their duty under the law to furnish an accounting to and strike a

balance with appellant, whereby appellant would be obligated to pay no more than 52⅓% of the loss, if any. This is conduct of a most fraudulent and oppressive kind. Courts have enjoined conduct of a far less inequitable and oppressive nature. Appellant should be granted his day in court for the presentation of evidence in proof of his first and third causes of action.

Respectfully submitted,

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